STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2010
v	No. 291331 Wayne Circuit Court
VINCENT TERRELL SPENCER, Defendant-Appellant.	LC No. 08-005854-01

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (sexual penetration with a person at least 13 and under 16 years of age).[1] The trial court, applying a second-offense habitual offender enhancement under MCL 769.10, sentenced defendant to two concurrent terms of ten to 15 years in prison. We affirm.

Defendant's convictions stemmed from his having had sexual intercourse with a thirteen-year-old girl – the cousin of his former girlfriend – in early 2007. The prosecutor alleged that there were three separate criminal incidents on three consecutive nights and that defendant committed third-degree CSC on the second and third nights. The prosecutor alleged that defendant committed first-degree CSC on the first night because defendant committed the felony of home invasion in connection with sexual penetration. See MCL 750.520b(1)(c). The jury rejected the charge of first-degree CSC but convicted defendant of two counts of third-degree CSC.

Defendant first contends that the trial court erred by admitting hearsay testimony. During the prosecutor's case, the victim's mother testified that she observed defendant and the victim together in a bathroom in December 2007.[2] Her testimony indicated that she was angry with

[1] The jury acquitted defendant of first-degree home invasion, first-degree CSC, and attempted third-degree CSC.

[2] There was no evidence introduced of sexual activity during this bathroom incident. The victim testified that she and defendant were going to have sex in the bathroom and began taking off their clothes, but the victim's mother interrupted them. The victim testified that she and

(continued…)

defendant and with the victim for being alone together in the bathroom. The following colloquy then occurred:

> *A.* Then I asked her how long had this been going on. I mean, like I said: [defendant] was a friend of our family. He was around our family a lot before we moved over to Isabelle.
>
> *Q.* So you asked her how long this had been going on?
>
> *A.* Yes.
>
> *Q.* Did there come a time when your daughter told you that she had a prior sexual relationship with –
>
> MR. BULLOCK [defense counsel]: Objection, leading.
>
> THE COURT: Sustained.
>
> MR. BULLOCK: I move [that] that be stricken, Your Honor.
>
> THE COURT: It's a question. The jury knows that questions are not to be taken as evidence.
>
> * * *
>
> *Q.* You were asking specifically. You said: How long had this been going on.
>
> *A.* Yes.
>
> MR. BULLOCK: That's what I objected to.
>
> THE COURT: That was the witness' answer previous to the question.
>
> MR. BULLOCK: Well, he's trying to bypass the hearsay rule. He's trying to get hearsay testimony from this witness by doing that. He is leading.
>
> THE COURT: Your objection is hearsay. It's overruled, because this witness has already testified that that's what this witness asked -- that's the question the witness asked . . . .
>
> *Q.* When you said how long had this been going on, what were you referring to? What is this?
>
> *A.* Her being sexually active and her being with [defendant].

(…continued)

defendant were "talking, and kissing, and stuff" before they went into the bathroom.

Q. Did she answer your question as it related to Mr. Spencer?

A. Yes.

Q. Without saying what she said?

A. Okay.

Q. Did her answer your concerns [sic]?

A. Yes.

Q. Did you do anything to act upon that concern, on that night?

A. On that night, no.

Q. Why didn't you do anything that night?

A. Because I didn't know exactly what to do. The next day I called the police, and had [an] officer come over to the house. And I talked to the officer. And that's when we were advised to go ahead and make a report and press charges and move forward. I was like, regardless of age, it shouldn't have happened.

Defendant argues that this exchange allowed the jury to hear improper hearsay testimony that the victim's answer to her mother about prior sexual relations with defendant caused her mother concern. We review the admission of evidence for an abuse of discretion. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Reincke*, 261 Mich App 264, 268; 680 NW2d 923 (2004).

Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The record does not reveal a statement by the mother that was offered in evidence to prove the truth of the matter asserted. The mother answered "Yes" when asked, "Did her answer your concerns [sic]?" This exchange is ambiguous at best and did not explicitly reveal whether or for how long there had been a prior sexual relationship between defendant and the victim. The prosecutor asked if the mother "[did] anything to act upon [her] concern," but the colloquy does not make clear *what* exactly concerned her, and it appears that the prosecutor was simply trying to establish how the mother ended up calling the police.

At any rate, "[e]videntiary error will not merit reversal unless it involves a substantial right and, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative." *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Even if we were to deem certain portions of the above colloquy hearsay, we conclude that, given the brief nature of the exchange and given the cumulative nature of the information it allegedly contained, it did not affect the outcome of the trial. Indeed, the victim herself clearly and unambiguously testified that there had been a sexual relationship between defendant and her before the bathroom incident, and thus we cannot discern how the

challenged exchange between the mother and the prosecutor could have affected the jury's verdict.

Defendant next argues that his convictions must be vacated because the prosecutor presented insufficient evidence of two sexual penetrations.[3] Defendant claims that there was only evidence of touching or rubbing.

> In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).]

The victim testified that she and defendant "had intercourse" in her bedroom. The following colloquy then occurred:

> *Q.* And you said that you had intercourse. I think I know what you mean. But could you just very be [sic] specific? I'm going to ask you a question: Did some part of [defendant's] body touch some part of your body?
>
> *A.* Yes.
>
> *Q.* What part of his body touched what part of your body?
>
> *A.* His penis touched my vagina.
>
> *Q.* And did it touch on the outside or somewhere else?
>
> *A.* On the inside, I guess.[4]
>
> * * *
>
> *Q.* Would you just repeat your answer?
>
> *A.* Inside.
>
> *Q.* And what did his body do when his penis touched inside of your vagina? What was his body doing?
>
> *A.* Moving.

[3] At one point defendant argues that only one of the convictions must be vacated, but he later argues that both convictions must be vacated.

[4] The victim later stated that she said "I guess" because "I don't like talking about topics like this in front of everybody."

* * *

Q. Tell the jury what that felt like to you, physically, when [defendant] had his penis inside of your vagina? What did that feel like?

A. It hurted a little.

* * *

Q. Did anything else happen between you and [defendant] like that weekend?

A. The same thing happened twice.

* * *

Q. And during the course of that visit, did some part of his body touch some part of your body?

A. Yes.

Q. Can you specifically tell us what part of his body touched what part of your body?

A. His penis touched my vagina.

* * *

Q. And did it feel the same to you that second day?

A. It didn't hurt as much as it did before.

* * *

Q. Did [defendant] ask you to do anything?

A. No, he gave me this like this thing. I don't know what it is. But he told me to put it inside of me and that it was going to stop me from being pregnant or something.

The victim later testified that a third incident occurred. The prosecutor asked, "And on that third night did his penis go inside of your vagina?" The victim answered, "Yes." Later, during cross-examination, the victim answered "Yes" when defense counsel asked, "You testified that [defendant] had vaginal sex with you, penis within vagina, three separate times?"

The victim's testimony, viewed as a whole, clearly provided sufficient evidence of two penetrations after the initial incident,[5] and this testimony was not required to be corroborated. MCL 750.520h. Defendant's appellant argument was without merit.

Defendant next argues that offense variable (OV) 4, OV 10, and OV 11 of the statutory sentencing guidelines were misscored.

"This Court will uphold the trial court's scoring of the guidelines if there is evidence to support it." *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002), aff'd 469 Mich 390 (2003). Information relied upon may come from various sources, including some that would not be admissible at trial, e.g., a presentence investigation report. See, generally, *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1101(b)(3) (the rules of evidence do not apply to sentencing proceedings).

Defendant received ten points for OV 4. Ten points are to be assessed for this variable if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). MCL 777.34(2) states, "Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive."

Defense counsel objected to the scoring of OV 4 at sentencing, and the trial court responded: "This victim is a child. She indicates in a letter to the court very serious psychological injury, and the court is going to assess 10 points." The court later stated, in discussing another OV, that it "had seen indication of a witness who was extremely traumatized. Her letter indicates she attempted to suicide and antifreeze [sic]." Further, in the victim's impact statement in the presentence investigation report, it was reported that the victim's mother said the following: "'My daughter is always quiet now. She does not talk to anyone.'" In light of this information, we conclude that the court did not err in the scoring of OV4. The record reveals adequate evidence in support of the score.

OV 10, which deals with "exploitation of a vulnerable victim," was originally scored at 15 points for "predatory conduct." MCL 777.40(1)(a). Defense counsel objected to this score, and the trial court ultimately assessed ten points under this variable because "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The court noted that the victim had been traumatized and had attempted suicide. The court further stated:

> . . . the fact that this victim had the situation she had in this household, the fact that the defendant had his ability [to] victimize her because of his relationship with family members[;] his knowledge, his power over her and his relationship could affect her; the court will assess the 10 points.

[5] Again, for the initial incident, the prosecutor attempted to prove first-degree CSC by claiming that defendant committed the felony of home invasion in connection with the penetration. See MCL 750.520b(1)(c). The jurors rejected this charge. They specifically asked whether they could "change the count of first degree to a third degree." The court told them "no."

> I don't know about predatory conduct, but exploiting a victim's youth, mental state and physical and domestic relationship involved [sic] would be more than is necessary for this particular offense, and the court will assess 10 points.

Defendant claims that the trial court mistakenly found that there was "automatically" exploitation of a vulnerable victim because of the family relationship between defendant and the victim, even though MCL 777.40(2) states that victim vulnerability should not be automatically presumed even if a domestic relationship or certain other factors exist. Defendant points out that under MCL 777.40(3)(c), "vulnerability" means "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." He contends that there was no evidence of such vulnerability in the victim.

At trial it was revealed that defendant dated the victim's cousin, who was a member of the victim's household. The victim stated that defendant "used to stay overnight with my cousin most of the time." She answered "Yes" when asked if defendant was "friendly" with the victim and her family. She also stated that defendant had a good relationship with her mother. The victim testified that on each of the three occasions when she and defendant had sex, he came into her bedroom at night. The first time, she was asleep when he came into her room. The victim's mother testified at trial that she and her family "treated [defendant] like family." She stated that "[h]e was there almost everyday [sic]" and that he "ate dinner with us, a lot." Trial testimony also revealed that the victim was 13 years old at the time of the offenses. The presentence investigation report indicated that defendant was born on December 8, 1984; thus, he would have been 22 years old at the time of the offenses.

Given the ages of the victim and defendant, given the family relationship that existed, and given that defendant entered the young victim's bedroom, at night, in order to commit the offenses, we find that the record adequately supported a score of ten points for OV 10. There was sufficient evidence of exploitation of a vulnerable victim.

OV 11 was scored at 50 points for "[t]wo or more criminal penetrations [that] occurred." MCL 777.41(1)(a). MCL 777.41(2) states:

> All of the following apply to scoring offense variable 11:
>
> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.
>
> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

Defendant claims that there was no additional sexual penetration "arising out of the sentencing offense" because each separate incident involved only one penetration. Thus, he claims that zero points should have been assessed under OV 11. Although defendant did not raise this challenge at sentencing, he contends that he is entitled to relief based on plain error or based on ineffective assistance of counsel. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), *People*

v Harmon, 248 Mich App 522, 530-531; 640 NW2d 314 (2001), and *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

The trial court sentenced defendant to a minimum term of 120 months. With a prior record variable score of 47 and an OV score of 70, and allowing for a 25 percent increase based on defendant's habitual-offender status, see MCL 777.21(3)(a), defendant's recommended range under the sentencing guidelines was 78 to 162 months. See MCL 777.63. If there had been a 50-point reduction in the OV score (for no sexual penetrations scored under OV 11), then the recommended range would have been 51 to 106 months, and if there had been a 25-point reduction in the OV score (for only one sexual penetration scored under OV 11), then the recommend range would have been 72 to 150 months. See MCL 777.21(3)(a) and MCL 777.63.

The three acts of sexual intercourse described by the victim occurred on three separate nights and there was no evidence that one "arose out of" the other. Accordingly, they did not form the basis for a score under OV 11. See *People v Johnson*, 474 Mich 96, 99-102; 712 NW2d 703 (2006). The victim did testify that during the "first night," defendant performed "oral sex" on her. When asked to clarify what she meant by "oral sex," the victim stated that "[defendant's] mouth touched my vagina." The victim stated that she did not initially tell the prosecutor about this because she was concerned about her grandmother, who was in the courtroom, hearing that defendant had performed oral sex on her. The definition of "sexual penetration" expressly includes "cunnilingus." MCL 750.520a(r). The prosecutor argues that given this testimony about oral sex, there was adequate evidence to support a score of 25 points under OV 11.

However, as noted earlier, the prosecutor attempted to prove first-degree CSC in connection with the first sexual incident, and the jurors rejected this charge. After beginning their deliberations, they specifically asked whether they could "change the count of first degree to a third degree," and the court told them "no." Under these particular circumstances, it is apparent that the jury's third-degree CSC convictions were based on the second two incidents of sexual penetration as described by the victim. Therefore, we cannot rely on the "oral sex" testimony in scoring OV 11, because that testimony concerned the first incident of sexual penetration as described by the victim.

Accordingly, OV 11 must be scored at zero. However, at sentencing, the trial court reduced the score for OV 13 from 25 points to zero explicitly based on defense counsel's and the prosecutor's argument that the number of penetrations was accounted for in OV 11.[6] With the reduction in scoring for OV 11, this rationale no longer applies. Therefore, 25 points are appropriate for OV 13, and the guidelines range becomes 72 to 150 months. Again, the original range was 78 to 162 months, and the trial court imposed a minimum sentence of 120 months.

Defendant contends that, under *Francisco*, 474 Mich at 89-90, resentencing is required because, even though defendant's sentence was within the newly calculated guidelines range, the newly calculated range differs from that relied on by the trial court. The key difference between

[6] OV 13 had been scored at 25 points because "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c).

this case and *Francisco*, however, is that in *Francisco* the scoring error was properly preserved. *Id*. at 89. The *Francisco* Court stated:

> [I]f the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel. [*Id*. at 89 n 8.]

We conclude that the modification in the guidelines range does not rise to the level requiring appellate relief. Indeed, we cannot conclude that if counsel had raised an objection at sentencing, a different sentence "reasonably would have resulted." *Harmon*, 248 Mich App at 531; see also *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Moreover, even assuming, without deciding, that this issue is subject to a plain-error analysis, we find that there was no outcome-determinative plain error that requires resentencing. *Kimble*, 470 Mich at 312.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering